Supreme Court Renders Decision in *Sackett v. EPA*

On March 21, 2012, the Supreme Court unanimously held in *Sackett v. EPA*, No. 10-1062, that US Environmental Protection Agency (EPA) administrative compliance orders under the Clean Water Act (CWA) constitute final agency action subject to immediate pre-enforcement review under the Administrative Procedure Act (APA). *Sackett* is a major loss for EPA and is likely to have wide-ranging impacts on the Agency's enforcement authority under the CWA, and other environmental statutes.

Chantell and Michael Sackett planned to build a home on a half-acre parcel of land in Idaho. After the Sacketts placed fill on a portion of the land prior to construction, EPA issued an administrative compliance order asserting that the Sacketts had violated the CWA by filling in a wetland without first obtaining a permit. EPA ordered the Sacketts immediately to remove the fill material, restore the parcel to its original condition, and monitor the fenced-off site for three years, or face potential penalties of up to US$43,500 per day. The order further required the Sacketts to provide EPA with access to their property as well as all records and documentation related to conditions at the property. EPA refused the Sacketts' request for an administrative hearing to challenge the Agency's finding that their parcel was a wetland under the CWA.

The Sacketts then sued in federal district court seeking an injunction against EPA, challenging both the Agency's wetland finding and its failure to grant a pre-enforcement administrative hearing. The district court dismissed the Sacketts' claim, concluding that the CWA precludes judicial review of compliance orders before EPA initiates an enforcement action in federal court.[1] The Ninth Circuit affirmed, relying on similar decisions from the Fourth, Sixth, and Tenth Circuits.[2]

The Supreme Court reversed, holding that EPA's compliance order was final agency action subject to immediate judicial review under the APA; and that the CWA does not preclude such review. The Court held that issuance of the compliance order was the "consummation of the agency's decision-making process" because its '"Findings and Conclusions' …were not subject to further agency review." Slip Opinion at 5-6. The Court rejected the government's argument that language in the compliance order inviting the

1 *Sackett v. EPA*, 2008 WL 3286801 (D. Idaho Aug. 7, 2008).

2 *Sackett v. EPA*, 622 F.3d 1139, 1147 (9th Cir. 2010).

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Sacketts to engage in informal discussion of the order in any way reduced or nullified its finality. Slip Opinion at 6. The Court stated: "The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Id.*

The Court also held that the Clean Water Act neither explicitly nor implicitly precludes judicial review of compliance orders. In perhaps the most broad-reaching passage from the opinion, with implications beyond the CWA, the Court rejected the government's argument that allowing judicial review would reduce the use of compliance orders and impede the efficient administration of the statute. The Court recognized that the government's contention "may be true—but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." Slip Opinion at 9.

The decision is likely to have several far-reaching consequences beyond the administration of the Clean Water Act or orders issued by the EPA. First, parties subject to administrative orders can rely on *Sackett* to support pre-enforcement challenges to orders rather than face the current Hobbesian choice of either complying with a potentially unreasonable or unlawful order or facing substantial penalties. Second, the opportunity for pre-enforcement review may make the Agency more cautious in issuing administrative orders, using such orders only where it is confident that it adequately studied, reasoned and justified an action so that it would not be vulnerable to an APA challenge before a reviewing court. Third, to the extent that EPA reduces its reliance on administrative compliance orders, nongovernmental environmental organizations may step into the enforcement vacuum by increasing citizen suit litigation efforts.

Finally, *Sackett* will likely have implications for judicial review of administrative orders under other environmental statutes such as the Clean Air Act and CERCLA (including the imposition of statutory liens under CERCLA). In rejecting pre-enforcement review, the Ninth Circuit had reasoned that the statutory language addressing administrative orders under the Clean Water Act was virtually identical to similar provisions in the Clean Air Act. The *Sackett* decision calls that reasoning into question, since the Court stated that "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." *See* Slip Opinion at 9-10.

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